AND
BRIEFS

Nos. 11-246 & 11-247

IN THE
Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, PETITIONER

v.

DAVID PATCHAK, ET AL.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

DAVID PATCHAK, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF FOR RESPONDENT DAVID PATCHAK IN OPPOSITION

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QUESTIONS PRESENTED

1. A plaintiff may bring suit under the Quiet Title Act ("QTA") "to adjudicate a disputed title to real property in which the United States claims an interest" if the plaintiff asserts a claim to a "right, title, or interest . . . in the real property." 28 U.S.C. § 2409a(d). Does the QTA's reservation of federal sovereign immunity for suits concerning "trust or restricted Indian lands" impliedly bar suits challenging agency action under the APA that could not be brought under the QTA because the plaintiff is not seeking to quiet title to the land in question?

2. Section 465 of the Indian Reorganization Act and its implementing regulations limit the Secretary of the Interior's discretion in deciding whether to take land into trust for an Indian tribe. Does a plaintiff living in a community affected by the Secretary's land-in-trust decision fall within the zone of interests protected by that provision and thus have prudential standing to enforce that limitation?

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BRIEF IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion is reported at 632 F.3d 702. DOI Pet. App. 1a. The opinion of the United States District Court for the District of Columbia is reported at 646 F. Supp. 2d 72. *Id.* at 27a.

JURISDICTION

The district court had jurisdiction over respondent's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals entered judgment on January 21, 2011, and on March 28, 2011, denied petitions for rehearing en banc. The petitions were timely filed by August 25, 2011, the deadline after the Chief Justice granted extensions to the time in which to file petitions for a writ of certiorari. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

1. The Match-E-Be-Nash-She-Wish Band of the Pottawatomi Indians, commonly known as the Gun Lake Band, was not federally recognized when Congress enacted the Indian Reorganization Act ("IRA") in 1934. Proposed Finding for Federal Acknowledgement of the Gun Lake Band, 62 Fed. Reg. 38,113, 38,113 (June 23, 1997). For nearly 100 years before the IRA's enactment, the Band affirmatively avoided the jurisdiction of the United States. This history is significant because in *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009), this Court held that the IRA allows the Department of the Interior ("DOI") to take land into trust only for "those tribes that were under

the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 1068.

In 1839, the Band placed itself under the protection of an Episcopalian mission to avoid the federal government's plan to move Indians west, and occupied lands in Allegan County, Michigan. Fee-to-Trust Appl., p. 4, COA JA 894. In 1855, the Episcopalian bishop declared that he held lands in trust for the Band. *Id.* at 895. Also in 1855, the Pottawatomi signed the Treaty of Detroit, which required Band members to reside in Oceana County, Michigan, and a majority of the Band complied with the treaty by moving to Oceana County. *Id.* But in 1870, the Band violated the treaty by returning to Allegan County, Michigan, thereby breaking off the Band's relationship with the federal government. Formal DOI Technical Assistance Letter from Joann Sebastian Moore, Director of Office of Tribal Services, to D.K. Sprague, Gun Lake Band, p. 2 (May 5, 1995), Exhibit A to Patchak's COA Appellant's Br. [hereinafter "DOI Technical Assistance Letter"]. As the DOI has previously determined, "[s]ince 1870, the Federal government has dealt with band members as individual Indians entitled to attendance at BIA schools, etc., but *has not dealt with the band as an entity*." *Id.* (emphasis added).

2. In 1993, the Band filed an application for federal recognition under 25 C.F.R. § 83.7, a section that applies only to tribes that are not acknowledged or recognized by the federal government at the time of application. The filing therefore acknowledged that the Band lacked federal recognition before 1993. See also Gun Lake Band COA Br., p. 3, COA JA 94 ("[T]he federal government withheld formal acknowledgement beginning in 1870. . . . Thus, for well

over a century, the Tribe was denied both federal recognition and reservation lands on which it could pursue commercial self-determination and self-sufficiency."). Before this Court's decision in *Carcieri*, the federal government also acknowledged the Band's lack of federal recognition. Decl. of George T. Skibine, Acting Deputy Assistant Secretary, Department of Interior, ¶ 8, COA JA 166 (noting that the Gun Lake Band's recognition had been previously terminated).

At the time the Band applied for federal recognition, the Band internally agreed "there would never be casinos in our Tribe," and represented in its constitution that it had "decided not to sacrifice the future of its membership to gaming interests and the changes to traditions in the community that gaming could bring." Fee-to-Trust Appl., p. 79, COA JA 925 (emphasis omitted). The Band received federal recognition in 1998. See Final Determination to Acknowledge the Gun Lake Band, 63 Fed. Reg. 56,936, 56,936 (Oct. 14, 1998).

3. In 2001, the Band applied for land to use for a casino complex. Its application requested that the United States take into trust a 165-acre site in rural Wayland Township (the "Bradley Tract") in Allegan County to enable the Band to construct and operate a casino complex. Trust Appl., COA JA 890. This land was owned by MPM Enterprises LLC, which was in turn owned by Station Casinos and other investors. *Id.*, p. 4, COA JA 878; Station Casinos, Inc., Mar. 31, 2011 Form 10-K at 11–12. In its application, the Band acknowledged that it "was ineligible to organize under the Indian Reorganization Act of 1934." *Id.*, p. 5, COA JA 895. And Band members echoed this concession during the application process: "For

approximately 150 years, my Tribe has suffered due to the United States' government's failure to recognize us as an Indian Tribe." Final EA, Appendix Q, p. 124, COA JA 855.

The environmental assessment conducted during the application process proposed a gambling complex of nearly 200,000 square feet, including almost 99,000 square feet of gaming space, two sit-down restaurants, a café, two fast-food outlets, four retail shops, a sports bar, an entertainment lounge, office space, and parking for more than 3,330 cars, buses, and RVs. Final EA, pp. 2-1, 2-2, COA JA 535, 729. This casino complex, which would be open 24 hours a day, 365 days a year, is expected to draw 3.1 million visitors annually—to a farming community of only 3,000 residents. *Id.*, Appendix H, COA JA 754, 577.

4. Fearing the substantial effect that a ratio of a thousand visitors to every resident would have on their community, members of the local community submitted numerous comments and urged DOI to reject the application. *Id.*, Appendix P, COA JA 779, 788. The final environmental assessment confirmed these concerns, noting that traffic during peak hours would be 1,110 cars per hour in this farming community. *Id.* p. 4-6, COA JA 623. But the DOI made a final agency determination on April 18, 2005, that it would acquire the Bradley Tract in trust for the Band. Notice of Final Agency Determination, 70 Fed. Reg. 25,596, 25,596 (May 13, 2005). The notice of determination stated that, in accordance with 25 C.F.R. Part 151.12(b), an IRA regulation, DOI was giving notice to the public "at least 30 days prior to the signatory acceptance of the land into trust." *Id.*

A nonprofit organization of concerned citizens, called Michigan Gambling Opposition ("MichGO"),

filed a complaint within 30 days of the notice and challenged the DOI's right to take the Bradley Tract into trust on a number of grounds, including failure to comply with the National Environmental Policy Act ("NEPA"), the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and the IRA. MichGO's IRA claim alleged a violation of the non-delegation doctrine. Because MichGO filed suit well before the Court's decision in *Carcieri*, MichGO did not assert that the DOI could not take land into trust because the Band was not federally recognized in 1934. And the courts refused to consider that issue in the MichGO litigation.

5. The MichGO litigation resulted in a stay that prevented the DOI from taking the land into trust. On August 1, 2008, during the stay and before the DOI took the land into trust, David Patchak filed this suit against the DOI. Patchak sought review under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 702, 706, of the DOI's final agency decision. Relying on *Carcieri*, he argued that the DOI lacked the authority to take the land into trust because the Gun Lake Band was not under federal jurisdiction in 1934.

Patchak, who lives near the Bradley Tract, moved to the area "because of its unique rural setting," and he "values the quiet life he leads in Wayland Township." Compl. ¶ 9, COA JA 12. The planned construction and operation of a casino complex, which would bring 3.1 million visitors annually to a community of 3,000 residents, would destroy that quiet lifestyle. *Id.*; *see* Final EA, ch. 3, p. 3-29, COA JA 577, 754. He anticipates the following adverse effects:

> (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical services; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino. [Compl. ¶ 9, COA JA 12.]

6. The stay in the MichGO litigation expired when the Court denied MichGO's petition for a writ of certiorari. Accordingly, Patchak moved for a stay to prevent the DOI from taking the land into trust. The district court denied Patchak's motion. The DOI took the land into trust five months after Patchak initiated this litigation. The government asserted that by taking the land into trust while Patchak's suit was pending, sovereign immunity under the Quiet Title Act sprang up. Thus, the DOI asserted that the DOI's action deprived the court of jurisdiction.

7. The district court dismissed Patchak's complaint on the theory that Patchak lacked prudential standing because he was not within the IRA's zone of interests. DOI Pet. App. 37a. Although acknowledging that the zone-of-interests test is "'not meant to be especially demanding,'" and that "it only excludes plaintiffs whose interests are so marginally related to or inconsistent with the purposes implicit in the

statute that it cannot be reasonably assumed that Congress intended to permit the suit," *id.* at 33a (quoting *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987)), the trial court concluded Patchak fell outside that zone because he was "not an Indian" and did not "seek to protect or vindicate the interests of any Indians or Indian tribes." *Id.* at 35a. The district court explicitly stated that "because the Court finds that plaintiff lacks prudential standing, the Court need not, and does not, reach [the Quiet Title Act] issue in this opinion." *Id.* at 37a n.12.

8. The D.C. Circuit reversed. DOI Pet. App. 22a. Emphasizing this Court's guidance concerning the APA's "generous review provisions," the "drive for enlarging the category of aggrieved persons," and that "the test is not especially demanding," *id.* at 5a (quotations and citations omitted), the court of appeals recognized that Patchak falls within the zone of interests protected by the IRA. "The IRA provisions interpreted in [*Carcieri*] limit the Secretary's trust authority." *Id.* at 7a. "When that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected." *Id.* The court of appeals noted that "[t]he Interior Department itself recognizes the interests of individuals like Patchak who live close to proposed Indian gaming establishments," as evidenced by the fact that DOI regulations allow "'affected members of the public' thirty days to seek judicial review before the Secretary takes land into trust for an Indian tribe," and that "[o]ther regulations require the Secretary to consider the purpose for which the land will be used and whether taking a tribe's land into trust would give rise to 'potential

conflicts of land use.'" *Id.* at 8a–9a (citing 25 C.F.R. §§ 151.12(b) & 151.10(c), (f)). The D.C. Circuit also observed that "[t]he zone-of-interests test weeds out litigants who lack a sufficient interest in the controversy, litigants whose 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* at 10a (quoting *Clarke*, 479 U.S. at 399). Unlike that type of marginal litigant, Patchak's "stake in opposing the Band's casino is intense and obvious," and it would be "very strange to deny Patchak standing in this case." *Id.*

The D.C. Circuit also rejected the government's assertion that Patchak brought a Quiet Title Act case and that because his APA claim related to land taken in trust for Indians, his claim was barred by sovereign immunity. *Id.* at 21a. The court of appeals noted that the "common feature of quiet title actions is missing from this case": Patchak is not trying to "'establish a plaintiff's title to land,'" as "he mounts no claim of ownership of the Bradley Tract." *Id.* at 14a. Focusing on the statutory text, the court observed that "the language of § 2409a firmly indicates that Congress intended to enact legislation building upon the traditional concept of an action to quiet title." *Id.* at 14a–15a. Section 2409a of the Quiet Title Act requires the plaintiff to "'set forth with particularity the nature of *the right, title, or interest which the plaintiff claims in the real property*.'" *Id.* at 15a (quoting 28 U.S.C. § 2409a(d)) (emphasis added). Further, Section 2409a(b) allows the government the option of retaining possession of the land if it loses the quiet title action, "so long as the government pays just compensation to the person entitled to the property." *Id.* at 16a. This just-compensation provi-

sion "is senseless unless there is someone else—the plaintiff—claiming ownership." *Id.* Accordingly, the D.C. Circuit refused to follow other courts that have "extended the reach of the Quiet Title Act beyond its text" and held that "the terms of the Quiet Title Act do not cover Patchak's suit" and that "[h]is action therefore falls within the general waiver of sovereign immunity set forth in § 702 of the APA." *Id.* at 21a.

The Court of Appeals noted that Patchak had argued that because he filed suit before the Bradley Tract was taken into trust, even if the Quiet Title Act applied, sovereign immunity did not bar his claim. The Court of Appeals chose not to address the issue in light of its determination that the Quiet Title Act did not apply to Patchak's claim in the first instance. *Id.* at 21a n.10.

9. After the Court of Appeals issued its decision permitting Patchak's challenge to the legality of the DOI's land-in-trust decision to proceed, the Band opened a sprawling casino complex on the Bradley Tract. As Patchak predicted, the casino has severely disrupted the rural character of the area. Media reports indicated that after opening, the parking lots at the casino were "so full and traffic is so heavy along US 131 [that police] closed the northbound and southbound exits" to the highway. Appellant's Resp. to Band's Mot. to Stay the Mandate, Exs. A, B. And police calls in the area have, as expected, "skyrocketed," doubling from historical levels in the first month of operations and tripling in the second month. Grand Rapids Press article, Apr. 9, 2011, *available at* http://www.mlive.com/news/grandrapids/index.ssf/2011/04/why_township_officials_arent_c.html ("It's been like dropping a small city into the middle of that area."). The casino complex

has thus already disrupted the rural lifestyle of Wayland Township; the inevitable result of bringing millions of annual visitors into a farming community of only 3,000 residents.

ARGUMENT

The petitioners contend that the APA's waiver of sovereign immunity is barred by the Quiet Title Act, even though Patchak is not bringing and cannot bring a quiet-title action. They also contend that Patchak does not fall within the zone of interests protected by § 465 of the IRA, even though he is seeking to enforce the limitation § 465 imposes under *Carcieri*, and even though the DOI itself considers interests like his when deciding whether to take land into trust under § 465. The court of appeals correctly rejected both contentions. No further review is warranted, especially given the interlocutory nature of the sovereign-immunity decision and the lack of any split among the circuits on the prudential-standing issue.

I. The Court should decline to address this interlocutory appeal

The D.C. Circuit's decision concluding that sovereign immunity did not bar Patchak's suit is interlocutory. This Court generally declines to exercise its certiorari jurisdiction to review interlocutory decisions. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see also *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970) ("this Court above all other must limit its review of interlocutory orders"); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the

litigation), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review granted after final judgment).

The Court should decline review here for two reasons. First, although *state* sovereign immunity is a right not to be sued, and so a right that may in some circumstances warrant protection even at the interlocutory stage, most of the federal circuits that have addressed the issue have recognized that *federal* sovereign immunity is merely a right not to pay damages—that is, a right that can be fully vindicated after judgment.

Second, a decision by this Court reversing the D.C. Circuit would not finally resolve the sovereign-immunity issue in this case. There is a second, independent reason that sovereign immunity does not apply that would need to be addressed on remand: Patchak sued before the government took the land into trust, and the APA waiver of sovereign immunity existing when he filed his complaint controls. Because reversing the Court of Appeals' decision on sovereign immunity likely would not change the outcome in this case, this case is an inadequate vehicle for this Court's review.

A. Because federal sovereign immunity is not a right to avoid trial, it can be vindicated after final judgment

As several federal courts of appeals have recognized, "it is difficult to speak of federal sovereign immunity as a 'right not to be sued.'" *Pullman Const. Indus., Inc.* v. *United States*, 23 F.3d 1166, 1168 (7th Cir. 1994) (Easterbrook, J.). "[I]t is quite unlike the eleventh amendment, which provides that '[t]he judicial power of the United States shall not be construed to extend' to suits against states, and the

Foreign Sovereign Immunity Act (FSIA), which gives foreign governments 'immunity from the jurisdiction' of our courts." *Id.* (citation omitted). For example, "[n]o one could argue with a straight face that the United States has, or ever had, a general 'right not to be sued' concerning taxes." *Id.* at 1169. Indeed, "the United States is no stranger to litigation in its own courts," given that "the United States Code is riddled with statutes authorizing relief against the United States and its agencies," including the fact that "Congress has consented to litigation in federal courts seeking equitable relief against the United States." *Id.* at 1168 (citing, for the last point, 5 U.S.C. § 702); see also S. Rep. 996, 94th Cong., 2d Sess. 4 (1976) (*Senate Report*) (legislative history to § 702 of the APA stating that "[f]or years almost every regulatory statute enacted by Congress has contained provisions authorizing Federal courts to review the legality of administrative action that has adversely affected private citizens"). Instead, "[f]ederal sovereign immunity today is nothing but a condensed way to refer to the fact that monetary relief is permissible only to the extent Congress has authorized it."[1] *Pullman*, 23 F.3d at 1168.

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[1] The Seventh Circuit noted that this Court had previously described federal sovereign immunity in dicta as a right not to be sued. *Pullman*, 23 F.3d at 1168. But those statements were dicta because, "in the entire existence of the United States, the federal government has never before taken an interlocutory appeal to assert sovereign immunity." *Id.* So although this Court may have made such statements in passing, it has not resolved the issue, and in fact has held that the collateral-order doctrine does not apply to all claims of "immunity." *Id.* at 1169 (citing *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988)); cf. *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004) ("Courts, including this Court,

[Footnote continued on next page]

Other courts of appeals that have considered the issue in the civil context have reached the same conclusion, including the Ninth Circuit in a case brought under the Quiet Title Act. *State of Alaska* v. *United States*, 64 F.3d 1352, 1355 (9th Cir. 1995) ("We hold that, despite the label 'immunity,' federal sovereign immunity is not best characterized as a 'right not to stand trial altogether.' . . . Like immunity from service of process (leading to lack of personal jurisdiction), federal sovereign immunity is better viewed as a right not to be subject to a binding judgment. Such a right may be vindicated effectively after trial."); *Houston Cmty. Hosp.* v. *Blue Cross & Blue Shield of Texas, Inc.*, 481 F.3d 265, 280 (5th Cir. 2007) ("'[T]he only portion of the United States' original immunity from suit that Congress continues to assert is a right not to pay damages.'" (quoting *Pullman*)). Although the D.C. Circuit disagreed with these other circuits on the scope of federal sovereign immunity, it did so outside the civil context, observing that it was "far from clear that Congress has waived federal sovereign immunity *in the context of criminal contempt*." *In re Sealed Case No. 99-3091*, 192 F.3d 995, 999 (D.C. Cir. 1999) (emphasis added); see also *Houston Cmty. Hosp.*, 481 F.3d at 279 (noting that the D.C. Circuit reached its conclusion "under circumstances too distinguishable to create a circuit split"); compare *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d

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[Footnote continued from previous page]
it is true, have been less than meticulous in this regard; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court. 'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'").

169, 192 (2d Cir. 2008) (distinguishing *Pullman* based on specific statutory language addressing discretionary-function immunity).

In short, federal sovereign immunity, unlike Eleventh Amendment immunity, is not a right to avoid suit. It is a defense that can be vindicated effectively after trial. See *State of Alaska*, 64 F.3d at 1357 ("The denial of federal sovereign immunity, we conclude, imposes no hardship on the United States that is qualitatively different from, or weightier than, the hardship imposed by the denial of such defenses as the statute of limitations or *res judicata*, both of which have been held to be effectively reviewable following trial.").

B. The existence of a second, independent sovereign-immunity issue means that a reversal would not resolve sovereign immunity in this case

This Court should also decline to grant review to decide the sovereign-immunity question presented because even if this Court were to reverse on that question, the Court's decision would not finally resolve the issue of sovereign immunity in this case. There is a second sovereign-immunity issue—the "time-of-filing issue"—that the court of appeals did not reach: "we do not address whether sovereign immunity should be determined as of the date his complaint was filed [on August 1, 2008] rather than after the Secretary took the land into trust [on January 30, 2009]." DOI Pet. App. 21a n.10. In other words, if this Court reverses and concludes that the Quiet Title Act applies, the United States will still have to address the separate argument that the Quiet Title Act's assertion of sovereign immunity does not apply

to suits filed before the land is taken into trust by the government. Therefore, this case is interlocutory with respect to the sovereign-immunity issue itself.

In the APA, Congress decided to waive sovereign immunity over suits challenging final agency actions. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . ."). Relying on that waiver, Patchak filed his complaint after the final agency determination and before the government took the land into trust under the IRA—in other words, in the window the government specifically created for judicial review.[2] Having waived its sovereign immunity for suits brought within that window, the government cannot at a later date reassert a right that it previously waived. Indeed, the finality of waiver—that it "eliminate[es]" the right—has led this Court to find a "waiver of the Federal Government's sovereign immunity" only if it is "unequivocally expressed in the statutory text." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (describing waiver as "'elimination of sovereign immunity'"); see also *Senate Report* 2, 5, 24, 25 (explaining that the statute will "eliminate[e]" sovereign immunity).

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[2] The DOI regulation's notice requirement imposes a floor, not a ceiling. It requires that the notice state that the DOI will acquire title "no sooner than 30 days after the notice is published." 25 C.F.R. § 151.12(b).

The Ninth Circuit considered a similar issue in *Bank of Hemet* v. *United States*, 643 F.2d 661 (9th Cir. 1981), and held that the United States could not retract—or un-waive—a waiver of sovereign immunity. In *Hemet*, the bank filed its complaint containing a quiet-title claim on January 4, 1978. At the time the bank filed its complaint, the government claimed title to the disputed property, and so the Quiet Title Act's waiver provision, 28 U.S.C. § 2409a, applied.[3] *Id.* at 665. Despite this waiver, the government sold the property several weeks later (on January 30, 1978), before service of the complaint was effected, and thereafter argued that the waiver did not apply because the government had divested itself of its interest in the property. *Id.* at 664. The Ninth Circuit, noting that the government had notice of the complaint before selling the property, rejected the government's attempt to divest the court of jurisdiction: "We hold that under the circumstances of this case the presence of a waiver of sovereign immunity should be determined as of the date the complaint was filed." *Id.* at 665. A contrary holding, the court of appeals recognized, would allow "the government to manipulate its position subsequent to the filing of the complaint so as to present a situation that falls between the cracks of applicable waiver statutes." *Id.*; see also *Delta Sav. & Loan Ass'n, Inc.* v. *IRS*, 847 F.2d 248, 249 n.1 (5th Cir. 1988) (following *Bank of Hemet*).

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[3] The exception in the Quiet Title Act for "trust or restricted Indian lands" at issue in Patchak's case was not implicated in *Hemet*.

Below, the government contended that it was not manipulating jurisdiction by its position, even though its time-of-filing theory would allow it to evade Congress's waiver of sovereign immunity in the APA for almost every instance where the government took land into trust for an Indian tribe. Under the government's theory, a plaintiff seeking to quiet title who filed suit under the APA before the government took the land into trust and after the agency's final determination would initially be allowed to bring his suit because Congress waived sovereign immunity via the APA. But once the act he was seeking to prevent occurred—that is, once the government took land into trust—the Quiet Title Act would automatically bar his suit from continuing (assuming the government is right that it can waive sovereign immunity and then later rescind its waiver). See *Dep't of Interior* v. *South Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting from decision to grant, vacate, and remand) ("The Solicitor General now represents to us that it is the position of the Department of the Interior, as well as that of the Department of Justice, that judicial review of an IRA land trust acquisition may be obtained by filing suit within the 30-day waiting period, although action will continue to be barred by the QTA after the United States formally acquires title."). The government's approach, in other words, holds out to citizens the opportunity to bring a suit to challenge the DOI's decision to take land into trust but then, like Lucy holding a football for Charlie Brown, pulls away the opportunity once the suit commences.

Other circuits have disagreed with the Ninth Circuit's decision in *Hemet* and have held (in the context of Eleventh Amendment immunity) that "a State may alter the conditions of waiver and apply

those changes to torpedo even pending litigation." *Maysonet-Robles* v. *Cabrero*, 323 F.3d 43, 52 (1st Cir. 2003); see also *Iowa Tribe of Kansas & Nebraska* v. *Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010); but see 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 105.21[4] ("The Ninth Circuit has the far better of the argument."). These circuits relied on *Beers* v. *State*, 61 U.S. 527 (1857), where this Court, in the context of state sovereign immunity, said that a sovereign "may withdraw its consent whenever it may suppose that justice to the public requires it." *Id.* at 529. But the government cannot contend that "justice to the public" requires withdrawing its waiver under these circumstances.

First, Congress has indicated, through the APA's waiver, that justice requires that parties aggrieved by an agency action should be allowed judicial review. That is why Congress waived sovereign immunity under the APA in the first place. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); see also *Senate Report* 3, 7 (explaining that Congress waived sovereign immunity in the APA to foster "the principles of accountability and responsive Government" and to avoid "'the unnecessary injustice cause by sovereign immunity'").

Second, DOI has specifically recognized the need to protect the interests of the public by allowing for judicial review of its decisions to take land into trust for Indian tribes. Land Acquisitions, 61 Fed. Reg. 18,082, 18,082 (Apr. 24, 1996) (codified at 25 C.F.R. § 151.12) (establishing "a procedure to ensure the opportunity for judicial review of administrative de-

cisions to acquire land in trust for Indian tribes . . . ."). Before adopting 25 C.F.R. § 151.12, the DOI could purportedly avoid judicial review of its land-in-trust decisions by reaching a final determination and immediately taking the land in trust. See *Dep't of Interior*, 519 U.S. at 920 (Scalia, J., dissenting from decision to grant, vacate, and remand). That is why DOI created a window between the final agency determination and the actual taking of the land into trust during which an APA challenge could be brought (as Patchak did here). 25 C.F.R. § 151.12(b); see also Notice of Determination, 70 Fed. Reg. at 25,596 ("The purpose of the 30-day waiting period in 25 CFR 151.12(b) is to afford interested parties the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes . . . before the transfer of title to the property occurs.").

The possibility of judicial review—described by members of this Court as "reviewability-at-the-pleasure-of-the-Secretary," *Dep't of Interior*, 519 U.S. at 920 (Scalia, J., dissenting from decision to grant, vacate, and remand)—is largely illusory if the government can override the APA waiver simply by taking the land into trust. The only way it is not illusory is if the plaintiff files early enough in the 30-day window to have time to persuade a court to issue a stay before the government can take the land into trust. But the possibility that the judiciary may intervene in time to stay the executive's hand does not diminish the unfairness of the government's approach. As one commentator has put it, "The government has the right not to be sued; it does not have the right to induce plaintiffs to invest time, money, and effort in a litigation, only to find that well along in the process, the government has

changed its mind." 16 MOORE'S FEDERAL PRACTICE § 105.21[4].

In any event, the "time of filing" sovereign-immunity issue has not been resolved by the D.C. Circuit or the district court. Thus, unless this Court addresses this so-far unreviewed issue, a decision reversing the court of appeals' decision would not finally resolve the sovereign-immunity issue in this case. This Court should therefore wait for a case that presents the question on which the petitioners seek review without the complication of a second ground to oppose sovereign immunity that could render this Court's decision without effect as to the parties before it.

II. The D.C. Circuit correctly held that the Quiet Title Act's sovereign-immunity bar did not apply because Patchak did not bring a quiet-title claim

As noted above, the APA broadly waives sovereign immunity for challenges to administrative decisions, like the DOI's decision to take land into trust. The APA then limits this waiver, stating that it does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Petitioners contend that the Quiet Title Act applies to this action and forbids the relief sought. The Quiet Title Act contains a broad waiver of sovereign immunity for quiet-title actions, but carves out land-in-trust decisions for Indian tribes from the general waiver. Although petitioners contend the Quiet Title Act applies to Patchak's claims, the plain language of the Act shows that Patchak has not asserted an action to quiet title. Thus, petitioners are left to argue that the Quiet Title Act impliedly bars

Patchak's suit. But petitioners' argument is illogical. It requires the Quiet Title Act's carve-out preserving sovereign immunity for land taken into trust for Indian tribes to be broader than the Quiet Title Act's waiver of sovereign immunity. The D.C. Circuit correctly reasoned, consistent with this Court's opinions, that "the terms of the Quiet Title Act do not cover Patchak's suit," and "[h]is action therefore falls within the general waiver of sovereign immunity set forth in § 702 of the APA." DOI Pet. App. 21a.

A. The decision below is consistent with both the Quiet Title Act and this Court's decisions

The Quiet Title Act, as its name suggests, allows plaintiffs to bring quiet-title actions against the government. The D.C. Circuit correctly analyzed the statutory text and concluded its sovereign-immunity rules apply only to suits that could be brought under the Act.

First, the Quiet Title Act waives sovereign immunity by allowing the United States to be named as a party defendant "in a civil action *under this section* to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a) (emphasis added). The exception to waiver that the government contends applies here is also specifically limited to claims brought under § 2409a: "This section does not apply to trust or restricted Indian lands." *Id.*

Second, the Quiet Title Act's pleading requirement spells out what civil actions can be brought under it: "The complaint shall set forth with particularity the nature of the *right, title, or interest which the plaintiff claims* in the real property, [and] the

circumstance under which it was acquired." 28 U.S.C. § 2409a(d) (emphasis added). In other words, civil actions brought under the Act are specifically limited to actions by plaintiffs who—unlike Patchak—are seeking to quiet title in themselves. *See* DOI Pet. App. 14a–15a.

Third, the text of § 2409a(b) provides that the United States may retain possession of the disputed property even if it loses a quiet-title action so long as it makes "payment to the person determined to be entitled thereto of an amount" that the district court determines "to be just compensation" for possession or control of the property. This provision further highlights that actions under this section involve claims of ownership; otherwise there would be no need for "just compensation" or a person "entitled thereto." *See* DOI Pet. App. 16a.

Nothing in this Court's decisions in *Block* v. *North Dakota*, 461 U.S. 273 (1983), or *United States* v. *Mottaz*, 476 U.S. 834 (1986), requires a different outcome. Those cases both involved traditional quiet-title actions—actions by plaintiffs who claimed an ownership interest in property adverse to the United States' claim of title to the property. In *Block*, "the United States and North Dakota assert[ed] competing claims to title to certain portions of the bed of the Little Missouri River within North Dakota." 461 U.S. at 277. North Dakota asserted a traditional quiet-title claim. This is borne out by the holding in *Block*: "We hold that Congress intended the QTA to provide the exclusive means by which *adverse claimants* could challenge the United States' title to real property." *Id.* at 286 (emphasis added). In *Mottaz*, the plaintiff had inherited interests in several parcels on a reservation, and asserted title to

the lands in dispute: "What respondent seeks is a declaration that she alone possesses valid title to her interests in the [parcels of land] and that the title asserted by the United States is defective." 476 U.S. at 842 (holding that the Quiet Title Act's 12-year statute of limitations barred her claim). Thus, both of these cases addressed traditional quiet-title actions. *See* DOI Pet. App. 18a.

The petitioners nevertheless contend that the Quiet Title Act applies and overrides the APA's waiver of sovereign immunity because § 702 does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. But such a prohibition is "not lightly to be inferred." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). "Judicial review of administrative action is the rule, and nonreviewability an exception . . . [which must be shown by] 'clear and convincing evidence of a contrary legislative intent.'" *Id.* at 166–67 (citation omitted).

The government argues that the legislative history of the APA—particularly a letter written by then-Assistant Attorney General Scalia concerning the phrase "expressly or impliedly forbids the relief which is sought"—confirms that the Quiet Title Act impliedly bars suits like Patchak's. DOI Pet. 10–11. But as explained above, Patchak is not bringing suit under the Quiet Title Act. For the carve out preserving sovereign immunity for Indian tribe land-in-trust decisions to impliedly bar Patchak's suit, the carve out must be interpreted to be broader than the Quiet Title Act's waiver of sovereign immunity. Nothing in the statutory text requires this illogical result.

Likewise, the legislative history of the APA undermines the government's argument. The word

"impliedly" was reportedly added to § 702 because the existence of a general sovereign immunity before 1976 meant that pre-1976 statutes (such as the 1972 Quiet Title Act) had no reason to expressly forbid relief against the United States. This in turn meant that "'in most if not all cases where statutory remedies already exist, these remedies will be exclusive.'" *Id.* (citation omitted). The fact that statutory remedies are exclusive reinforces the point that the statutory text governs and that Patchak's suit, which could not be brought under the Quiet Title Act, is not impliedly covered by the Quiet Title Act's immunity provisions. As explained in the legislative history, when the statute Congress has passed "is not addressed to the type of grievance which the plaintiff seeks to assert"—here, Patchak's suit that does not assert a quiet-title claim—"suit would be allowed." *Senate Report* 27. Put another way, this legislative history for § 702 of the APA does not show, as the government would have it, that the Quiet Title Act impliedly bars actions that do *not* qualify as quiet-title actions. Consequently, the D.C. Circuit correctly concluded that the Quiet Title Action does not apply, and that Patchak's action falls within the APA's general waiver.

B. The conflict is new and should be given more time to develop now that a court of appeals has, for the first time, focused on the Quiet Title Act's text

Although other circuits have concluded that the Quiet Title Act impliedly forbids parties from bringing APA suits to challenge the DOI's decision to take land into trust, those decisions are not consistent with the text of the Quiet Title Act. See DOI Pet.

App. 21a ("The courts of appeals mentioned above have extended the reach of the Quiet Title Act beyond its text.").

In *Florida Department of Business Regulation* v. *Department of Interior*, 768 F.2d 1248 (11th Cir. 1985), the Eleventh Circuit—the first circuit to rule on this issue—never addressed § 2409a(d)'s requirement that the plaintiff claim "right, title, or interest . . . in the real property," and even admitted that "technically the suit in the instant case [was] not one to quiet title." *Id.* at 1254. Instead, the Eleventh Circuit based its conclusion on the policies it found underlying the Quiet Title Act, not on the language of the Act. The court of appeals also relied on its belief that under the IRA the DOI had such unlimited discretion to take land into trust for a tribe that any decision would be essentially unreviewable, *id.* at 1256–57, failing to note the temporal limit that *Carcieri* recognizes as limiting the DOI's discretion—that only tribes under federal jurisdiction in 1934 are eligible to have land taken into trust for them. The Ninth Circuit's decision in *Metropolitan Water District of Southern California* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court *sub. nom. California* v. *United States*, 490 U.S. 920 (1989), also never addressed § 2409a(d)'s statutory requirement that the plaintiff be an adverse claimant and instead focused simply on a policy argument, citing *Florida Department of Business Development*. *Id.* at 143–44. The Tenth Circuit also tracked the Eleventh Circuit's policy-based analysis. *Neighbors for Rational Dev.* v. *Norton*, 379 F.3d 956, 962 (10th Cir. 2004) (discussing *Florida Department of Business Development*). And although the Tenth Circuit at least mentioned the pleading requirements of § 2409a(d), it mentioned them only to say that

"plaintiffs cannot circumvent the intent of the Quiet Title Act's limitations with artful pleading." *Id.* at 965. But ignoring the Act's express pleading limitations, as the Tenth Circuit did, is not the way to effectuate those limitations.

This circuit split is new, created by the D.C. Circuit's decision. Now that a circuit has reached a decision based on the text of the Quiet Title Act and not underlying policy considerations, this Court should allow more time for other circuits to address the issue and weigh the competing arguments. Furthermore, to the extent that national uniformity is important, petitioners themselves admit that uniformity can be achieved by the fact that APA suits can be brought in the D.C. Circuit. DOI Pet. 16. In short, because the D.C. Circuit is correct and can provide uniformity on this issue, there is no need for this Court's review.

Beyond that, the government's arguments about the adverse consequences of this decision are overstated. The government suggests that under the D.C. Circuit's decision, all land-in-trust decisions are forever subject to attack. First of all, Patchak sued *before* the land was taken into trust; his suit does not raise the specter of *post hoc* attacks initiated years after the land was taken into trust. Second, actions challenging taking land into trust are subject to traditional defenses including the APA's own statute of limitations. See 28 U.S.C. § 2401(a); cf. *Delano Farms Co.* v. *Cal. Table Grape Comm'n*, 655 F.3d 1337, 1350 (Fed. Cir. 2011).

The government further argues that the decision will "severely disrupt the Secretary's acquisition of trust lands for Indians" because "[a]ny plaintiff seeking to sue the Secretary can obtain venue in the

United States District Court for the District of Columbia, 28 U.S.C. 1391(e), and in light of the decision below, there is little reason for a plaintiff to bring a case anywhere else." DOI Pet. 16. Ten months have passed since the D.C. Circuit issued its opinion, but no new cases have been filed against the Secretary of the Interior relating to lands already held in trust for Indian tribes. Moreover, the very incentive the government claims was created by the D.C. Circuit's decision has existed for 35 years without the disruption the government fears.

In 1978, the District Court for the District of Columbia addressed the situation where, as here, a plaintiff brought suit under § 702 of the APA to challenge the DOI's decision to take land into trust for an Indian tribe, arguing that the Sault Ste. Marie tribe was not a tribe within the meaning of the Quiet Title Act. *City of Sault Ste. Marie* v. *Andrus*, 458 F. Supp. 465, 467 (D.D.C. 1978). The district court, noting that § 2409a of the Quiet Title Act requires a plaintiff "to state with particularity the nature of the right, claim, or interest plaintiff possesses in the property at issue," rejected the government's claim that the Quiet Title Act's sovereign-immunity provision barred the suit. *Id.* at 471. As the court explained, because "plaintiffs do not possess the type of property right which would be necessary for the maintenance of a quiet title action, it is clear that 28 U.S.C. [§] 2409a is inapplicable to this suit, and may not, therefore, force dismissal of this suit due to the doctrine of sovereign immunity." *Id.* at 472. In other words, for the last 35 years plaintiffs have had the exact incentive that the government claims now causes a significant adverse consequence. Plaintiffs have continued to bring suits elsewhere, as evidenced by the decisions cited as creating a circuit

split—a 1985 decision by the Eleventh Circuit, a 1987 decision by the Ninth Circuit, and a 2004 decision by the Tenth Circuit.

This issue does not warrant the Court's review at this time.

III. The prudential-standing decision does not conflict with this Court's decisions, implicate a circuit split, or warrant this Court's review

The petitioners contend that Patchak falls outside the zone of interests arguably protected by § 465 of the IRA, the provision on which Patchak based his suit, because Patchak's asserted injuries focus on the use the land will be put to, rather than some other harm from the DOI's decision to take land into trust. But as the D.C. Circuit explained, § 465 covers interests like Patchak's.

For one, Patchak did not need to show that § 465 of the IRA was meant to benefit those in his situation. In *National Credit Union Administration* v. *First National Bank & Trust Co.*, 522 U.S. 479 (1998), the Court explained that it does "not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff." *Id.* at 492. Instead the Court "first discern[s] the interests 'arguably to be protected' by the statutory provision at issue," and "then inquire[s] whether the plaintiff's interests affected by the agency action in question are among them." *Id.* For another, the zone-of-interests test also includes within its scope those who can be expected to challenge a provision. *Clarke*, 479 U.S. at 398 ("The essential inquiry is whether Congress 'intended for [a particular] class

[of plaintiffs] to be relied upon to challenge agency disregard of the law.'").

In *Carcieri*, the Court interpreted § 465 and § 467 to limit the DOI's discretion to take land into trust for Indians. 129 S. Ct. at 1064–66. The fact that the statute limits the DOI's discretion demonstrates that § 465 at least arguably exists to protect the interests of the community that would be affected if the land were taken into trust, for members of the community make up part of the class that can be relied upon to challenge land-in-trust decisions.

This interpretation is supported by the DOI's own regulations under § 465 of the IRA, which specifically require the Secretary to consider both "[t]he purposes for which the land will be used" and "potential conflicts of land use" when deciding whether to take land into trust. 25 C.F.R. § 151.10(c), (f). And the DOI further recognizes that its decision to take the land into trust affects the surrounding community—i.e., people like Patchak—by providing "affected members of the public" with notice before the land is taken into trust so that they can seek judicial review under the APA. Land Acquisitions, 61 Fed. Reg. 18,082; 25 C.F.R. § 151.12(b). The government says nothing in its petition to explain why the DOI thinks land use is directly relevant under these regulations promulgated under § 465 yet not an interest even "arguably within the zone of interests to be protected" by the APA's "generous review provisions." *Clarke*, 479 U.S. at 395–96.

Not only is the decision below consistent with this Court's decisions, it does not conflict with the decisions of other circuits. The first evidence of this is that the government does not allege a circuit split on the prudential-standing issue. DOI Pet. at 18–23.

And all of the cases the Band cites are distinguishable. For example, the Eighth Circuit in *Rosebud Sioux Tribe* v. *McDivitt*, 286 F.3d 1031 (8th Cir. 2002), relied on statutes that the court of appeals thought were "intended to protect only Native American interests." *Id.* at 1036–37. Here, however, this Court has recognized that § 465 of the IRA is intended to be a limitation on the government's ability to take land into trust for Indians. *Carcieri*, 129 S. Ct. at 1067 n.7 ("[W]e conclude that the language of § 465 unambiguously precludes the Secretary's action with respect to the parcel of land at issue in this case."). The Sixth and Seventh Circuit decisions the Band relies on addressed situations where the interest asserted was "at odds with the concerns of the provision in issue," *Jonida Trucking, Inc.* v. *Hunt*, 124 F.3d 739, 742 (6th Cir. 1997), or "inconsistent" with the relevant provisions, *Courtney* v. *Smith*, 297 F.3d 455, 464, 466 (6th Cir. 2002); *Am. Fed'n of Gov't Employees* v. *Cohen*, 171 F.3d 460, 471 (7th Cir. 1999). But again, § 465 imposes a limitation on the Secretary, and Patchak's suit seeking to enforce that limitation is consistent with the purposes of the statute.

In short, the Secretary's own procedures for taking land into trust under § 465 acknowledge that placing the land in trust affects the interests of the surrounding community. The D.C. Circuit's recognition that Patchak is arguably within that zone of interests was correct, consistent with the decisions of this Court, and consistent with the decisions of its sister circuits. The prudential-standing issue also does not warrant this Court's review.

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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